Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1996

THE PRODUCE PLACE

Petitioner,

v.

UNITED STATES DEPARTMENT
OF
AGRICULTURE, et al.,

Respondents.

Petition For Writ of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Stephen P. McCarron, Esq.
McCARRON & ASSOCIATES
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 364-0400

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QUESTION PRESENTED

Whether the definition of interstate commerce, under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a(b)(3) and 499a(b)(8), extends federal jurisdiction over transactions that are wholly in intrastate commerce?

PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the District of Columbia are: The Produce Place, a California corporation, the United States Department of Agriculture and the United States of America.

The Produce Place has no parent companies or subsidiaries.

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Petitioner, The Produce Place, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 23, 1996, and the subsequent denial of the Petition for Rehearing on September 20, 1996.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the agency decision against Petitioner. 91 F.3d 173 (D.C. Cir. 1996). (App. 1.) Decision and Order of the Judicial Officer of the United States Department of Agriculture. 53 Agric. Dec. 1715 (1994). (App. 14.)

JURISDICTION

Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 23, 1996, and a petition for rehearing denied on September 20, 1996. This Court's jurisdiction to consider this petition from the final judgment or decree by a court of appeals is invoked pursuant to 28 U.S.C § 1254.

STATUTORY PROVISIONS

(a) Perishable Agricultural Commodities Act, 7 U.S.C § 499a(b)(3)

The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia;

(b) Perishable Agricultural Commodities Act, 7 U.S.C § 499a(b)(8)

A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

(c) Perishable Agricultural Commodities Act, 7 U.S.C § 499b

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce -

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such a dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or fail to maintain the trust as required under [section 499e(c) of this title];

(d) Packers and Stockyards Act, 7 U.S.C. § 183

For the purpose of this Act (7 U.S.C. §§ 181 et seq.) (but not in any wise limiting the foregoing definitions) [see 7 U.S.C. § 182] a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat

packing industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products or eggs, are sent from one state with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another state, or for slaughter of livestock within the state and the shipment outside the state of the products resulting from such slaughter.

STATEMENT OF THE CASE

In late 1992, Petitioner purchased six (6) loads of berries, grown in California, from two (2) California companies, for resale and consumption in California (App. 33).

The United States Department of Agriculture (the Department) filed a complaint against Petitioner seeking revocation of its PACA license on the ground that Petitioner made false statements for a fraudulent purpose in violation of the PACA, by altering product temperatures on six (6) inspection certificates relating to the berries, and then uttering the certificates to the sellers in California. (App. 14).

An ALJ filed an initial decision concluding that the transactions were in interstate commerce even though the berries were not "sent from one state with the expectation that they would end their transit, after purchase, in another

(state)." 7 U.S.C. § 499a(b)(8). The ALJ determined it would be administratively burdensome for the agency to prove that the berries left California. So he decided that the transactions were in interstate commerce because: 1) berries regularly move in interst e commerce; 2) petitioner regularly engages in interstate purchases and sales; and 3) some of the berries were sold to a national hotel chain (App. 33-35). The ALJ sanctioned Petitioner by imposing a 30-day suspension to be held in abeyance if the employee responsible for the inspection alteration was terminated for six (6) months (App. 14). On appeal, the Judicial Officer, the final agency authority, affirmed, holding that the transactions were in interstate commerce (App. 38-45), and increasing the sanction to an unconditional 90-day license suspension (App. 15).

On a petition for review to the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 2342(2), the court also affirmed. On the issue of whether the transactions were in interstate commerce, the court upheld the ALJ's decision that the transactions were in interstate commerce based on the three (3) factors listed by the ALJ because it would unduly burden the administration of the PACA to prove that the berries moved from one state to another (App. 5-9).

REASONS FOR GRANTING THE WRIT

The court of appeals decision should be reviewed by this Court because it vastly expands federal jurisdiction under the PACA, the Packers and Stockyards Act and every other federal act which uses the term "current of commerce" to define the bounds of federal regulatory authority.[1] The court of appeals decision broadens federal jurisdiction to encompass intrastate transactions which is contrary to the statute and decisions of the Court in Swift & Co. v. United States, 196 U.S. 375, 49 L.Ed.518, 25 S.Ct. 276 (1905) and Stafford v. Wallace, 258 U.S. 495, 66 L.Ed.735, 42 S.Ct. 397 (1922).

The PACA regulates transactions in interstate commerce. Section 2(4) of the Act, 7 U.S.C. § 499b(4), at issue in this case, makes conduct unlawful only if it is in connection with a transaction in interstate commerce. "Interstate commerce" is defined as commerce between any State or Territory or the District of Columbia, 7 U.S.C. § 499a(b)(3). The part of the statute at issue in this case is the "current of commerce" clause at § 499a(b)(8) which

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[1] Other federal acts using the term "current of commerce", or "current of interstate commerce" to define interstate commerce jurisdiction are: The Commodity Exchange Act, 7 U.S.C. § 3; Tobacco Inspection Act, 7 U.S.C. § 511(i); Agriculture Adjustment Act, 7 U.S.C. § 608(b) and (c) and § 610, and 12 U.S.C. § 1141(a); Agriculture Marketing Agreement Act, 7 U.S.C. § 671; Federal Seed Act, 7 U.S.C. § 1561(a)(4); Securities Exchange Act, 15 U.S.C. § 78b; National Labor Relations Act, 29 U.S.C. § 151(b); and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401(c)(2).

states that a transaction involving a commodity can be considered in interstate commerce, ". . . if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one state with the expectation they will end their transit, after purchase, in another . . ." (Emphases added.)

The "current of commerce" phrase in § 499a(b)(8) was taken from § 2(b) of the Packers & Stockyards Act (PSA), 7 U.S.C. § 183, (see p. 3, supra), which has been in the PSA since its enactment in 1921 without amendment. The origin of the wording is explained in Stafford v. Wallace, 258 U.S. 495, 66 L.Ed.735, 42 S.Ct. 397 (1922), in which the Court affirmed two (2) lower court orders denying challenges to enforcement of the PSA on the ground that Congress could not regulate business in the stockyards under the Commerce Clause because such business was not in interstate commerce. As explained in Stafford v. Wallace, the Court decided in 1905 that the business done in the national stockyards was subject to federal regulation under the Commerce Clause. Swift & Co. v. United States, 196 U.S. 375, 49 L.Ed.518, 25 S.Ct. 276 (1905). In Swift, a bill of equity, brought by the United States against the large meat packing firms for conspiracy to monopolize the national meat industry, was upheld in the face of a Commerce Clause challenge that the firms' activities were not within the jurisdiction of the federal government because they did not involve interstate

commerce. The opinion in Swift rejected that argument on the ground that the cattle moved from one state to another, and that one transaction during the marketing of the cattle from rancher to slaughterhouse is not out of interstate commerce merely because it takes place in one state. The Court used the phrase "current of commerce" to describe this concept.

> Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true, at least, of such a purchase by residents of another state from that of the seller and the cattle. Id., U.S. at 398-399.

The "current of commerce" phrase was adopted by Congress in § 2(b) of the Packers & Stockyards Act, 7 U.S.C. § 183 in 1921. ("It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift case." Stafford v. Wallace, supra, U.S. at 520.) A year later, the Court further explained the meaning of "current of commerce" in Stafford v. Wallace by noting that a transaction which involves products moving across state lines is in the current of commerce and under federal

authority, even though there are times when the products are in one state.

> The application of the commerce clause of the constitution in the Swift case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are everflowing, are, in their very essence, the commerce among the states and with foreign nations which historically is one of the chief purposes of the constitution to bring under national protection and control. This Court declined to defeat this purpose and respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part. Stafford v. Wallace, supra, U.S. at 518-519. (Emphasis added.)

The "current of commerce" clause of § 499a(b)(8) has been part of the PACA since its original enactment in 1930, and it is taken from § 183 of the PSA nearly verbatim (the only changes being those referencing the commodities regulated by the respective Acts), evidencing incorporation of the principles announced in Swift and Stafford v. Wallace. Thus, it encompasses those transactions that take place in a state which facilitate the movement of commodities from one state to another. However, a transaction between a buyer and seller in one state, involving commod-

ities that never leave the state, is not in a current of commerce usual in the trade from one state to another and, therefore, is not in interstate commerce.

The court of appeals opinion is the first court decision holding that interstate commerce jurisdiction under PACA, and other federal acts using the phrase "current of commerce," encompasses transactions involving products or commodities intended for, and wholly in intrastate commerce. The same is true, at the agency level, of the Department's decision.

In arriving at this novel interpretation, the Department disregarded the plain meaning of the jurisdictional clauses in §§ 499a(b)(3) and 499a(b)(8), and decided that the transactions were in interstate commerce even though they were not "sent from one state with the expectation that they will end their transit, after purchase, in another . . ." 7 U.S.C. § 499a(b)(8). The Department framed a new test because, if the statutory test was followed, it would "greatly burden the administration of the Act". (App. 6, 35-36.) Under this new standard, the transactions were in interstate commerce because: (1) berries regularly move in interstate commerce, (2) petitioner regularly engages in interstate purchases and sales of produce, and (3) some of the berries in question were sold to a national hotel chain (App. 6, 34-35).

The court of appeals decided that the Department's administrative burden rationale for disregarding the plain meaning of the jurisdictional clauses was entitled to defer-

ence because the phrase "current of commerce" is ambiguous (App. 7). But there is no ambiguity because to be in a "current of commerce", the commodities must be "sent from one state with the expectation that they will end their transit, after purchase, in another . . . ." 7 U.S.C. § 499a(b)(8), and these berries were not sent from California with the expectation that they would end their transit, after purchase, in another state.

The court of appeals justified the Department's interpretation by likening the "current of commerce" to an interstate highway or river. (App. 7.) But a "current of commerce" is not a common means of public transport. Rather, it is a convenient jurisdictional shorthand for the idea that there is interstate commerce jurisdiction over purchase or sale transactions which occur in one state but which involve commodities or products that flow across state lines during their existence.

The court of appeals disregarded the established meaning of "current of commerce" in Swift and Stafford v. Wallace by trying to distinguish these cases on the ground that they do not address transactions involving products that never leave a state (App. 7-8). But this rationale wholly misses the mark. Swift and Stafford v. White are directly on point because they lay down the rules for deciding if a transaction is in interstate commerce because the commodity is in a "current of commerce". Under these cases, if the commodity is not sent from one state, it cannot be in a "current of commerce" as defined by these cases.

It is obvious that this new standard was formulated because the Department would not have had jurisdiction over the transactions if the statutory language of §§ 499a(b)(3) and 499a(b)(8) were followed. If this new standard was applicable only to petitioner's case, then a writ of certiorari should be denied. However, the new standard is much broader. It subjects any and all produce and meat transactions to federal jurisdiction, as well as all transactions governed by other statutes using the phrase "current of commerce". See Footnote 1, supra. It thereby improperly shifts a great deal of the States' authority over intrastate transactions to the federal government, which Congress did not intend.

CONCLUSION

For the reasons stated, Petitioner, The Produce Place, prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

McCARRON & ASSOCIATES

STEPHEN P. McCARRON
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 364-0400

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1154

THE PRODUCE PLACE Petitioner v. DEPARTMENT OF AGRICULTURE, et al Respondents	*	Appeal from the United States Department of Agriculture

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Submitted: December 5, 1995

Filed: July 23, 1996

Before GINSBURG, ROGERS and TATEL, Circuit Judges.

Opinion for the Court by Circuit Judge GINSBURG.

The Produce Place, a wholesale dealer in fruits and vegetables, petitions for review of a Department of Agriculture order suspending for 90 days its license to do

business. Having determined that the Petitioner's challenges to the legal and factual bases of this order lack merit, we deny the petition.

I. Background

The Perishable Agricultural Commodities Act, codified as amended at 7 U.S.C. §§ 499a et seq., provides that no person may carry on the business of a commission merchant, dealer, or broker (as defined in the Act) without a license issued by the United States Department of Agriculture. 7 U.S.C. § 499c. The PACA also proscribes certain "unfair conduct," and specifically makes it unlawful for a licensee to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer ... 7 U.S.C. § 499b(4). Violation of this provision may result in a 90-day license suspension. 7 U.S.C. § 499h(a).

The Produce Place is a wholesale produce dealer located in Los Angeles. A substantial portion of its business involves the interstate purchase and sale of fruits and vegetables. In October and November 1992 the Produce Place purchased six loads of berries from two California growers through the growers' sales agent, Sandy

Jurach. These so-called "late-season berries" were weaker than berries harvested earlier in the season and thus were not suitable for shipment over a long distance.

Shortly after each load arrived, a USDA-authorized inspector noted the general condition of the fruit and measured and recorded its temperature on a certificate issued to the Produce Place. Knowing the temperature helps a buyer or seller determine whether produce has been handled properly since it left the seller's hands, an important fact because the seller usually warrants that the produce was in suitable condition when shipped. If the produce arrives in poor condition despite proper handling--including maintenance of the proper temperature--then the seller may be liable to the purchaser under the warranty.

After the berries arrived Ted Kaplan, an employee and one-third owner of the Produce Place, reported to Sandy Jurach that there were problems with their condition and asked for a price reduction. Jurach does not grant such price reductions without a federal inspection certificate documenting the condition in which the shipment was received. Kaplan altered the temperature recorded on the six USDA inspection certificates and faxed her copies of them. He claims that he did this because federal inspectors require that each shipment be removed from coolers for inspection, resulting in a temperature increase and a recorded temperature that does not accurately reflect the temperature at which the shipment was transported and

stored. The inspection certificates indicated that each shipment had sustained bruising and decay, and Jurach did reduce the prices for the various shipments by as much as 75%, for a total reduction of $9,111.00. She authorized the price reductions based not upon the (altered) temperatures reported, but upon her knowledge that the berries were weak and upon the information on the certificates concerning the general condition of the shipments.

During an investigation inspired by an anonymous tip regarding irregularities in the records maintained by the Produce Place, a USDA investigator discovered the altered inspection certificates. The Fruit and Vegetable Division of the Agricultural Marketing Service (USDA) charged the Produce Place with "willful, flagrant and repeated violations" of 7 U.S.C. § 499b(4). After a two-day hearing, an Administrative Law Judge found that the Produce Place had committed the alleged PACA infractions, and the departmental Judicial Officer eventually imposed a 90-day license suspension.

II. Analysis

The Produce Place raises three issues in its petition for review: (1) whether the transactions at issue occurred within "interstate commerce" as that term is used in the PACA, and thus whether the Secretary of Agriculture had jurisdiction over this case; (2) whether 7 U.S.C. § 499h(a)(2) provides the sole authority for administrative

sanctions in this case, and thus whether the Secretary was empowered to act against the Produce Place even though it had not been convicted of the misdemeanor set out at 7 U.S.C. § 499n(b); and (3) whether substantial evidence in the record supports the ALJ's finding that Kaplan altered the inspection certificates with fraudulent intent. We find no merit to the Petitioner's argument on any of these issues.

A. "Interstate Commerce"

The Produce Place argues first that the six transactions at the source of this case did not occur in "interstate commerce" as that phrase is used in the Act. (The Petitioner does not argue that the transactions are beyond the constitutional reach of the Congress under the Commerce Clause of the United States Constitution, Art. I § 7.) The PACA provides both its own definition of "interstate commerce," 7 U.S.C. § 499a(b)(3), and in § 499a(b)(8) a guide to its interpretation: A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another....

APPENDIX A

The Produce Place argues that the raspberries and strawberries at issue here were deliberately reserved for intrastate commerce because their weak condition made them unsuitable for interstate shipping and that, therefore, they never entered "the current of [interstate] commerce." According to the ALJ, however, the six shipments of strawberries and raspberries with which we are concerned did enter the current of interstate commerce because (1) strawberries and raspberries regularly move in interstate commerce, (2) the Produce Place regularly engages in interstate purchases and sales of produce, and (3) the Produce Place sold some of these strawberries and raspberries to a national hotel chain. In these circumstances, the ALJ explained, the exclusion of the six shipments from the Secretary's jurisdiction would "greatly burden the administration of the Act."

We must reject the Petitioner's notion that the Congress intended to impose upon the Secretary the burden of proving that a particular shipment of produce was intended for interstate commerce in addition to showing that the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce. The Produce Place does not dispute that this would significantly burden the administration of the Act and concedes that the Secretary's understanding of "current of commerce" is due deference

under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Indeed, we have repeatedly held that an agency "can legitimately take into account its administrative burdens when defining an ambiguous term," National Fuel Gas Supply Corp. v. FERC, 900 F.2d 340, 345 (D.C.Cir. 1990) (citing cases), and the term "current of commerce" is nothing if not ambiguous.

As a textual matter, the Secretary has offered a reasonable interpretation. In the spirit of the riverine metaphor used by the Congress, we read the Secretary implicitly to suggest that the current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown. Or consider the perhaps more contemporary case of a truck that regularly uses an interstate highway to carry shipments of a commodity, one of which shipments is to an intrastate destination.

Contrary to the Petitioner's argument, nothing in Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735 (1922), precludes the Secretary's interpretation. That

case involved the constitutionality of the of the "current of commerce" provision in the Packers and Stockyards Act of 1921, 7 U.S.C. § 183. Relying upon Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905), an antitrust decision from which the Congress had in fact lifted the "current of commerce" metaphor, the Supreme Court held that even a transaction occurring wholly within an individual stockyard is in the current of interstate commerce: "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one state to another." 258 U.S. at 516, 42 S.Ct. at 402. The Court did not, however, address the status of a particular stockyard transaction that facilitates only intrastate sales, the case that would be analogous to this one.

Nor can the Petitioner cite any prior disciplinary case in which the Secretary has adopted an interpretation of 7 U.S.C. § 499a(8) that is inconsistent with the interpretation he advances in this case. The Petitioner does cite C.B. Foods, Inc., 43 Agric. Dec. 489 (1981), but it is not on point because the perishable commodities at issue there had traveled interstate before the intrastate sale that gave rise to that case.

We do not understand the Secretary to take the position that the Produce Place could not possibly have demonstrated--perhaps based upon the maintenance of rigid

separation between its interstate and intrastate business--that some shipments of strawberries pass through its hands without entering the current of interstate commerce. His main concern appears to be whether the separation between the current of interstate commerce and a separate and distinct stream of intrastate commerce is sufficiently clear that recognizing the distinction would not unduly burden the administration of the Act. As noted, in this case the Produce Place has not even disputed the Secretary's conclusion that he would face a formidable administrative burden if the Petitioner were to prevail here.

B. Administrative vs. Criminal Sanctions

In addition to authorizing the Secretary to suspend the license of a dealer who "make[s], for a fraudulent purpose, any false or misleading statement in connection with any transaction," 7 U.S.C. §§ 499h(a)(1) and 499b(4), the PACA authorizes the Secretary to suspend the license of a dealer convicted of a misdemeanor under 7 U.S.C. § 499n(b) ("Whoever shall falsely make, issue, alter, forge, or counterfeit ... any certificate of inspection ... shall be guilty of a misdemeanor"). 7 U.S.C. § 499h(a)(2). The Produce Place has not been convicted under § 499n(b), and the Secretary accordingly proceeded against the company under §§ 499h(a)(1) and 499b(4).

The Produce Place argues that because § 499n(b) sanctions the specific offense of "forg[ing] ... a certificate

of inspection," by the principle that expressio unius est exclusio alterius, forgery cannot be thought also to come within the more general condemnation of "false [ ] statements" in § 499b(4). The Produce Place argues also that because § 499b(6) makes it unlawful to "alter ... any ... notice placed upon any container" the same principle precludes reading "false [ ] statement" in § 499b(4) to encompass the purposeful transmission of a fraudulently altered inspection certificate. The first line of reasoning leads to the peculiar conclusion that the Secretary, who has general authority to suspend a licensee for making a false statement must, in the case of a particularly egregious type of false statement, to wit, a forged inspection certificate, await a criminal conviction before he can suspend the miscreant. The second line of reasoning leads to the equally peculiar conclusion that prior to its enactment of the criminal sanction in § 499n(b), the Congress had provided the Secretary with no authority to suspend a licensee who had fraudulently altered an inspection certificate and used it to facilitate a transaction.

In any event, the PACA authorized the Secretary to sanction a dealer for making a false statement long before the Congress added a criminal penalty for forging an inspection certificate. That the Congress found the threat of imprisonment necessary in order to deter that particular type of false statement in no way suggests that the Congress had not already empowered the Secretary to take

administrative action against a forger under § 499b(4). Nor does anything in the legislative history provided by the Produce Place suggest that by adding a criminal provision the Congress intended to limit the Secretary's pre-existing administrative authority. Section 499h(a)(2), which authorizes the Secretary to suspend or revoke the license of any dealer convicted under the criminal provision (§ 499n(b)), is therefore better understood as a means merely of relieving the Secretary, when the inculpative facts have already been found beyond a reasonable doubt in another forum, of the procedural burden entailed in making a factual determination under § 499b(4), and not as creating the exclusive means of suspending the license of a forger. Moreover, as the Secretary points out, the terms "remove, alter, or tamper with" in § 499b(6) do not reach the full extent of Kaplan's conduct in this case; he not only altered the inspection certificates, he submitted them to Jurach. While one might conclude from the specific terms of § 499b(6) that the Secretary cannot proceed under § 499b(4) against a licensee who has merely altered an inspection certificate without somehow using it in connection with any transaction--indeed, it is not clear that altering a certificate and then putting it in a file counts as a "mak[ing a] statement"--we have no occasion to reach that issue today. For now it is enough to conclude that neither of the Petitioner's expressio unius arguments is at all persuasive.

APPENDIX A

C. Evidence of Fraudulent Intent

Finally, the Produce Place argues that the record does not contain substantial evidence indicating that Ted Kaplan altered the inspection certificates "for a fraudulent purpose." Kaplan admitted at the hearing, and the ALJ found, that Kaplan altered the certificates in case one of the Petitioner's customers, Ralph's Supermarkets, questioned whether the berries had been properly chilled. The ALJ also found that Kaplan had altered the certificates in order to support his request for a price adjustment from his supplier, Sandy Jurach.

The Produce Place does not dispute either finding but argues that they do not establish a fraudulent purpose. According to the Petitioner, Kaplan was merely trying to correct the information on the certificate in order to compensate for "what he perceived to be a flaw in the inspection process"--namely, that it required removing the berries from the cooler so far in advance of the actual inspection that their temperature would rise between three and seven degrees--rather than to mislead either Jurach or Ralph's as to the actual temperature at which the berries had been transported or stored.

Even if all this is true, it is wholly beside the point, which is that Kaplan knowingly misrepresented the temperature recorded by the inspector and intended that others would rely upon his misrepresentation. Kaplan's honest belief that the certificates did not reliably indicate the

condition of the berries is not a license for him to change them. Those with whom the Produce Place deals may understand quite well the imperfections in the inspection process--Jurach testified that she did--and may adjust for those imperfections when considering the temperature recorded on an inspection certificate; then the unaltered information, even if uncertain, would be valuable within the trade. Indeed, that Kaplan altered the certificates in order to facilitate transactions with Ralph's and Jurach is ample evidence of his belief that the temperatures recorded on those certificates would matter to them. Whether they did in fact matter (and Jurach testified that they did not matter to her in this case) is not relevant to the validity of the ALJ's conclusion that Kaplan's purpose was fraudulent.

III. Conclusion

For the foregoing reasons, the petition for review is Denied.

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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D 93-550
The Produce Place	)	
Respondent	)	**Decision and Order**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.), in which Administrative Law Judge James W. Hunt (ALJ) filed an Initial Decision and Order on July 22, 1994, suspending Respondent's license for 30 days for making false and misleading statements, for a fraudulent purpose, in purchasing six lots of berries in interstate commerce, but holding the suspension in abeyance if Respondent removes Ted Kaplan from its business for a period of 6 months. The violations occurred on six occasions when Ted Kaplan, acting for Respondent, The Produce Place, altered USDA inspection certificates for berries, and faxed the altered certificates to the sellers' agent. The alterations lowered the range of temperatures recorded for the berries to 40 degrees or below. (To prevent deterioration, berries should be stored at 40 degrees or below.) The sellers' agent, after receiving faxes of the altered inspection certificates, agreed to substantial discounts of the prices paid by Respondent for the berries, ranging from 40% to 75%.

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On August 17, 1994, Complainant, seeking revocation of Respondent's license, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35)**. On September 19, 1994, Respondent filed a cross-appeal, seeking dismissal of the Complaint. On October 11, 1994, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, an unconditional 90- day suspension order is being issued. For convenience, the Initial Decision is adopted as the final Decision, with deletions shown by dots, additions or changes shown in brackets, and trivial editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

** The position of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relation to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

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This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) ("PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. ss 1.130 through 1.151).

This proceeding was instituted by a complaint filed on August 30, 1993, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that respondent, The Produce Place, a PACA licensee, committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), by making, for a fraudulent purpose, false or misleading statements in connection with purchases of perishable agricultural commodities made in the course of interstate commerce. The complaint further alleged that such false or misleading statements consisted of false documentation reflecting the amount of perishable agricultural commodities "dumped" with respect to two purchases made in February 1992 and April 1992, and six falsified inspection certificates with respect to purchases made in October 1992 and November 1992. The complaint requested that respondent's license be revoked.

A hearing was held on March 22 and 23, 1994, in Los Angeles, California. Complainant was represented by

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Andrew Y. Stanton, Esq. Respondent was represented by Stephen P. McCarron, Esq., Washington, D.C.

Facts

In December 1992, Patrick Romero, senior marketing specialist for USDA's PACA Branch in Tucson, Arizona, received a phone call from an anonymous caller at the Los Angeles County Department of Agriculture claiming that a William Velasco, an investigator for the County who had retired in July 1992, had issued a "dump" certificate for The Produce Place, a licensed PACA produce dealer in Los Angeles, relating to Produce Place's purchase of green snap beans from a Florida company called Cee-Bee Produce, Inc. (Tr. 25-28.) This so- called "dump" certificate, signed by Velasco, was a Los Angeles County document entitled "Produce and Egg Quality Notice of Noncompliance." The certificate refers to 251 cartons of green beans that Produce Place had received from "C B Produce." It states under "final disposition" that the beans were "dumped." (CX 12.)

Romero discussed the matter with his supervisor who advised him to conduct an investigation. In January 1993, Romero asked to see the company's records. Melvin Herman, Produce Place's president, made them available to him. Romero went through the Cee-Bee file, but found no problem with the particular green bean transaction referred to by the anonymous caller. He then proceeded to

spend 2 weeks reviewing transactions in two or three thousand other files. He found three incidents that he considered "questionable": the first related to Produce Place's purchase of green beans from a company called Premium Produce on February 6, 1992; the second concerned the purchase of peppers from Cee-Bee Produce on April 4, 1992; the third related to six purchases of strawberries and raspberries from Coastal Berry Corporation and Bay Fruit and Vegetable, Inc., in October and November 1992. (Tr. 32-34, 55, 129-130.)

. . .

The Berry Transactions

In the course of his investigation, Romero found six questionable federal inspection certificates which related to Produce Place's purchases over a 5- week period, from October 7, 1992, to November 10, 1992, of strawberries and raspberries from Coastal Berry Corporation (now called N.T. Gargiulo, L.P.) and Bay Fruit and Vegetable, Inc., both located in Watsonville, California. Romero found them questionable because, for each certificate, there appeared to be a copy containing a different temperature reading. (Tr. 85.)

One copy of the inspection certificate dated October 7 for strawberries from Bay Fruit (which sold its fruit through Coastal Berry's seller, Sandra Jurach) states that temperature of the strawberries ranged from 43 to 47

degrees (CX 4a, p. 8); another copy of the same certificate gives the temperature range as 36 to 40 degrees (CX 4a, p. 5). The berries were received at an undetermined time on October 6 and inspected at 7:50 a.m. on October 7. (CX 4a, pp. 4-5.)

One copy of the certificate dated October 15 for strawberries from Bay Fruit gives the temperature range as 41 to 43 degrees (CX 5a, p. 9); the other copy gives the range as 36 to 40 degrees (CX 5a, p. 5). The berries were shipped at 5:45 p.m. on October 14 and inspected at 8:00 a.m. the following morning. (CX 5a, pp. 4-5.)

One copy of the certificate dated October 20 for strawberries from Bay Fruit gives the range as 42 to 44 degrees (CX 6a, p. 7); the other copy gives the range as 36 to 40 degrees (CX 6a, p. 3). The berries were received on October 19 and inspected on October 20 at 7:15 a.m. (CX 6a, pp. 3-4.)

One copy of the October 23 certificate for strawberries from Bay Fruit gives the range as 45 to 46 degrees (CX 7a, p. 9); the other copy gives the range as 35 to 39 degrees. (CX 7a, p. 3.) The berries were received on October 23 and inspected at 1:05 p.m. on October 23. (CX 7a, pp. 3, 5.) The words "192 straws" also appear at the end of the second copy but not on the first. (CX 7a, p. 3). The invoice (CX 7a, p. 2) shows that 192 cartons of strawberries were purchased while the inspection certificate shows that 96 were inspected.

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One copy of the October 28 certificate for strawberries from Coastal Berry Corporation gives the range as 43 to 46 degrees (CX 10a, p. 10); the other copy gives the range as 36 to 40 degrees (CX 10a, p. 4). The berries were received on October 27 and inspected on October 28 at 12:20 p.m. (CX 10a, pp. 4, 7.)

One copy of the November 10 certificate for raspberries from Coastal Berry gives the range as 42 to 44 degrees (CX 8a, p. 10); the other copy gives the range as 35 to 39 degrees (CX 8a, p. 4). The berries were received on November 3 and inspected on November 5 at 12:15 p.m. (CX 8a, pp. 4, 8.)

All copies of the inspection certificates, regardless of temperature reading, state that the berries "fail to grade U.S. No. 1 only account condition." For the strawberries, this was due to varying degrees of bruising and decay. For the raspberries, this was due to some being overripe and to decay.

Bruce Summers, senior marketing specialist for PACA, testified that temperature readings on inspection certificates reflect whether produce has been handled properly. In produce transactions, he said, there is a warranty by the shipper that the produce sent to the receiver is in "suitable shipping condition." Summers said that when produce is shipped in good condition, the responsibility for any problems with the produce when it is received is with the receiver, but that the circumstances,

such as length of trip and number of defects in the produce, can determine whether the shipper or receiver is responsible for any deterioration in the produce. (Tr. 158-159, 166-168.) Inspectors take from 3 to 10 temperature readings from each load of produce they inspect. The optimum storage temperature for the berries is under 40 degrees. (Tr. 265, [339, 346-348,] 361.)

When Romero saw the discrepancies in the temperature readings on the inspection certificates, he asked Herman[, president and one-third owner of Respondent (CX 1; Tr. 293),] for the reason. Herman responded that he did not know, but said he would "get to the bottom of it." (Tr. 93.) Ted Kaplan [, vice president and one-third owner of Respondent, who "head[s] up the sales force and buying force" of Respondent (Tr. 311),] then called Romero to tell him that he had altered the temperature readings on the certificate[s] to show a lower temperature range than the ones on the original certificates. Romero said that Kaplan told him that Sandra Jurach, the seller of the fruit for Bay Fruit and Coastal Berry (the latter now called N.T. Gargiulo, L.P.), had told him that if the produce showed a high temperature when it was inspected, he was to cool the fruit down, change the temperature on the certificate and fax a copy to her. (Tr. 93-94.)

Romero talked to Jurach about the transaction. She told him that she had given Produce Place an adjustment on the price of the berries because of their market condition

and that she had received faxed copies of the altered inspection certificates from Kaplan. However, she did not receive copies of the original unaltered certificates until [several months] later. (Tr. 113-114 [, 258-259, 262, 277-278]; CX 9, p. 1.) Romero did not indicate in his testimony whether he had asked Jurach if she had told Kaplan to cool the berries and alter the certificates.

Jurach testified that she did not tell Kaplan to cool down the berries[, and that "the copies that I got weren't high temperatures."] (Tr. 262.) Kaplan also testified that Jurach had not told him to cool them. He said the matter probably relates to problems that Produce Place had had that summer with a trucking company called Paul's which had delivered fruit with a high temperature because the truck had sat somewhere for a couple of hours before making the delivery. Kaplan had the produce cooled down, apparently before it was inspected. (Tr. 317.)

Kaplan said he had changed the temperature reading on the six berry certificates because the reading on the certificates was not a "true definition," that is, it did not reflect the temperature in the company's coolers, which ranges between 34 and 36 degrees and which he checks every day. (Tr. 312, 316-317, 342.) [He testified that "I was changing those documents for my internal records basically" (Tr. 337), but he admitted that, even though he kept a copy of the original certificates and the altered

certificates, he faxed Jurach only a copy of the altered certificates (Tr. 337- 338).]

Kaplan testified that when he requests an inspection, he is told to "get the produce ready," which he interprets to mean to get the produce out of the cooler and onto the dock or warehouse floor where it will be inspected and that "you figure within a couple hours they're going to be there and you get ready because they're busy and we're busy." (Tr. 320-323.) When there is a lapse of time until the inspection is conducted, the temperature of the produce goes up and does not reflect its holding temperature in the cooler. (Tr. 285, 312-315.) He said that berries that take only 5 or 6 hours to ship should be in good shape when he receives them, but that he had been having a problem with the berries sitting on the dock waiting for an inspection and then getting "poor" temperature readings. (Tr. 330, 340.) He did not say how long the berries involved here had been out of the cooler before being inspected, but said that they had been in the cooler before being inspected. He testified that some of his customers have insisted that he keep the fruit at 40 degrees or under and that he changed the certificates as an "internal record" to show that he was handling the fruit properly. (Tr. 338-339, 342.) Kaplan stated that his alteration of the certificates was not meant to be fraudulent and that it made no difference as far as getting a credit for the berries from Jurach, from whom he receives produce almost daily. He said he knew before the

alterations were made that he would get a credit because of the quality and condition of the berries and that he had never had any difficulty obtaining adjustments from his suppliers [and] that they had [n]ever made any complaints against him. (Tr. 274, 337-341.) As for the addition of the words "192 straws" on the October 23 certificate, he said this number was to reflect that, although the inspector had looked at 96 boxes, there were 192 boxes of strawberries in the load. (Tr. 332.)

Jurach testified that she hears "all the time" from her customers that the temperature of the produce has gone up because it has to be taken out of the cooler before it will be inspected. (Tr. 265, 276.) Clifton Harada, a USDA inspector, testified that produce is usually inspected outside the cooler, but that it is not the policy of the inspectors to tell dealers to take the produce out of the cooler before the inspector arrives. He said there are 12 inspectors who are kept busy servicing about 200 companies. Harada said some dealers will bring the produce out of the cooler before the inspector arrives, while others wait until after he arrives. Harada testified that he has never heard any complaints about the temperature going up because of the produce being brought out of the cooler and that inspectors will wait about 15 minutes for the produce . . . [firm to begin taking the product out of the coolers for inspection, and as long as boxes are continually being brought out of the coolers, the inspector will wait for the process to

continue, which "can take up to thirty minutes" (Tr. 366)]. Inspectors do not tell a dealer when they will arrive, and it may take up to 4 hours, after a request for inspection is made, before an inspector arrives. (Tr. 357-360, 362, 367, 372-373.) Bruce Summers, PACA's senior marketing specialist, testified that it would not be a proper inspection procedure if inspectors left produce out of a cooler for an hour before inspecting it. (Tr. 162.)

Jurach, who has been doing business with Produce Place for 8 years, testified that she has never had a problem with or complaint against the company. The five loads of strawberries and one load of raspberries involved in this proceeding that she sold to Produce Place were grown in the Watsonville/Salinas, California, area, a driving distance of about 6 to 8 hours from Produce Place in Los Angeles. (Tr. 244-247.)

The berries shipped to Produce Place in October and November were the last in a growing season that starts in March. By the end of the season, Jurach testified, the plants and fruit are weaker. She said these berries are sold locally, including Los Angeles, because they would not survive being shipped to markets in the East. She testified that after the berries involved here were shipped to Produce Place, Kaplan called to say that he had problems with them and that he was going to have them inspected and would fax a copy of the certificate to her. She said she determines whether to give an adjustment based on the quality

of the produce shown by the inspection certificate. She gave Produce Place a price adjustment because of the berries' bruising and decay. She said she experienced similar problems with other buyers she sold to during the same time period and had given them adjustments as well. (Tr. 248-250, 274, 275.)

Jurach testified that she did not know at the time that Kaplan had changed the temperature readings on the inspection certificates and did not receive copies of the unaltered certificates for about 3 months. She said that if she had known the certificates had been altered, she would have questioned Kaplan about the unaltered temperature readings, but probably would have accepted his word that the produce being inspected outside the cooler had caused the increase in temperature. The unaltered temperatures, she said, were not unusual readings. She testified that she would have still given Produce Place the price adjustment, because she had heard about the same inspection problem from other people and because she knew the quality of the berries. The addition of "192 straws" on the October 23 certificate would also not have mattered, because she assumed it referred to the number of strawberries in the lot. (Tr. 277-280, 282, 285-286.)

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Law

Section 1(8) of the PACA (7 U.S.C. § 499a[(b)](8)) provides: [See page 2 of the Petition for Writ of Certiorari, supra].

Section 2(4) (7 U.S.C. § 499b(4)) provides: [See page 3 of the Petition for Writ of Certiorari, supra].

Section 8(a) (7 U.S.C. § 499h(a)) provides: . . .

Discussion

. . .

II. Altered Inspection Certificates

Section 2(4) of the Act prohibits the making, for a fraudulent purpose, of any false or misleading statement in connection with any transaction involving any perishable agricultural commodity received in interstate commerce. The complaint alleges that Produce Place violated this provision of the Act when Kaplan altered temperature readings on six federal inspection certificates for the strawberries and raspberries.

It is well settled that "Congress is not to be presumed to have used words for no purpose. . . . Courts are to accord a meaning, if possible, to every word in a statute." Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878). Therefore, in order to prove a violation of the above provision of the Act, complainant must not only show a) that Produce Place made a false or misleading statement,

but it must also show b) that the statement was made for a fraudulent purpose.

Produce Place acknowledges that Kaplan altered the six inspection certificates to indicate temperatures different from those that had been recorded by the USDA inspectors, but, nonetheless, insists that the alterations do not constitute false statements under the Act. It argues that the temperature[s] in the altered certificates are not false because they properly reflect the actual temperatures of the coolers where the berries were held, and that the inspection procedure, which requires the berries to be removed from the coolers before being inspected, caused the berries to warm up by the time the inspectors arrived.[1] Respondent contends, in effect, that it is the original inspection certificates which are "false," since they do not reflect the storage temperature of the berries in the cooler.

This contention overlooks one important point: the temperature readings on the inspection certificates do not

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[1] Although it is not the policy of the inspection service to require that produce be taken out of the cooler before an inspector arrives, the record shows that most inspectors require that produce be taken out of the cooler before being inspected and allow about 15 minutes for this process [to begin. However, as long as product is being removed from the coolers, the inspectors will wait until all the produce has been removed, which can take up to 30 minutes (Tr. 366).] The record also shows that it is an industry practice for [some] busy dealers to take produce out of the cooler after they request an inspection due to the uncertainty of when inspectors will arrive, which can take anywhere from 15 minutes to 4 hours.

state, and it is not otherwise shown, that their purpose is to document the average temperature of the coolers. Instead, they reflect the actual average temperature of the berries at the time they were inspected by USDA personnel. [In order to obtain an accurate reading, the inspectors take a minimum of 3 pulp temperatures, and an average of 8 to 10 pulp temperatures (Tr. 361-62). The inspection certificate shows "a range, the lowest to the highest temperature" (Tr. 361).] There is no argument that the inspectors failed to take correct readings at the time they inspected the produce. Members of the industry are also aware that the temperatures on the certificates are those taken while the produce is out of the cooler, as Jurach testified in pointing out the problem that this practice creates. Moreover, even assuming that the inspection certificates were intended to reflect the temperature at which the berries were held in the cooler, [which is not true,] Produce Place has still not shown that the altered temperature readings reflect the actual storage temperature of the berries, and has not shown that the higher temperatures recorded by the inspectors was due to the berries being out of the cooler for an extended period of time.

Therefore, as the certificates reflect the fact of the temperature of the berries at the time they were inspected, any change in those readings would not be correct readings. Accordingly, I find that Kaplan made a false or misleading statement when he altered the inspection

certificates to change the temperature readings, even if he did so to reflect the temperature of the berries while in the cooler.

The next question is whether the false statements, in the form of altered inspection certificates, were made for a fraudulent purpose. In considering this issue, it should be kept in mind, as complainant argues, that members of the produce industry rely on inspection certificates as a report from an impartial third party on the condition of the commodity. As Munguia testified, producers and shippers usually rely on the certificates to verify claims by dealers that the produce they received was in poor condition. A certificate can, therefore, be a key determining factor concerning who bears the loss because of the poor quality of the produce, that is, whether the loss is to be borne by the receiver (dealer) because of his improper handling of the produce, or on the producer/shipper, because of his breach of the warranty to supply the produce in suitable shipping condition. Any alteration of a federal inspection certificate thus poses a direct threat to the integrity of the document for this purpose, as well as posing a danger that it might be misused by a party claiming a credit to which he otherwise is not entitled.

Considering these implications, I find that it can be inferred for purposes of establishing a prima facie case that anyone who would benefit from making material falsifica-

tions in an inspection certificate does so for a fraudulent purpose.

Produce Place argues that even though Kaplan altered the inspection certificates, it was not unlawful, because complainant has not shown that any persons relied on the alterations to their detriment. The Act, however, does not provide that a party must rely to its detriment upon false statements made for a fraudulent purpose before a violation can exist. Moreover, the Judicial Officer has indicated that a violation occurs at the time the inspection certificate is altered. Jacobson Produce, Inc., 53 Agric. Dec. [728, 759 (1994), appeal docketed, No. 94-4118 (2d Cir. July 14, 1994)].

Kaplan's explanation for his alteration of the certificates was that it was for internal recordkeeping purposes because some of the company's customers, such as Ralph's, required that the berries they purchased be kept at 40 degrees or cooler, and that he made the alterations to keep a record of the temperatures at which the berries were stored. He also said that when he made the alterations, he knew that the shipper's representative, Jurach, would have granted a price adjustment even if the certificates had not been altered.

However, altering a government document for internal recordkeeping purposes is simply not a defense, particularly when there were obviously many other unobjectionable ways for Kaplan to keep such records. [Moreover, in each

case, Kaplan faxed Jurach the altered inspection certificate, rather than the unaltered certificate, proving conclusively that he did not change the temperatures merely for internal recordkeeping purposes.] Kaplan's argument that Jurach would have granted an adjustment without the altered certificates is likewise no defense to his actions. It may be that Kaplan did not even have to send her the [altered] certificates in order to obtain an adjustment, but when he did send them to her, he was obligated to send her the certificates in their unaltered form, or else clearly inform her at the time that they contained incorrect information to prevent her from being misled.[2] It was for Jurach, not Kaplan, to evaluate all the information on the unaltered inspection certificates in deciding whether to agree to a price adjustment. Instead, he sent her the documents without telling her that they had been changed. The inherent danger in this practice, of which Kaplan as an experienced produce dealer should have been aware, was that Jurach could have relied on the false statement in the certificates to her detriment, and to Produce Place's benefit, in deciding to allow an adjustment. It was tantamount to fraud for Kaplan, regardless of his intent, to send

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[2 Jurach testified that it is her practice to ask for an inspection certificate on every lot of produce where an adjustment is requested, and that she does not make a determination whether to give an adjustment or not until after she receives a copy of the inspection certificate (Tr. 257-258, 274-275).]

her inspection certificates without revealing to her at the time that material information in the certificates -- the recorded temperatures -- was not true. [But the evidence here compels the inference that Kaplan sent Jurach the altered certificates for a fraudulent purpose--to facilitate obtaining substantial price reductions.]

The Act does not require that a fraudulent purpose be the only reason for making a false statement; it requires only that it be one of the reasons. I accordingly find that Kaplan's explanations for his actions do not overcome complainant's prima facie case and find that when Kaplan sent Jurach altered inspection certificates containing false information, without telling her that they had been altered, he made a false statement for a fraudulent purpose in violation of section 2(4) of the Act.

III. Interstate Commerce

Produce Place contends that complainant has no jurisdiction over its transactions involving the strawberries and raspberries because it is not shown that this produce was ever in interstate commerce. The record shows only that the berries were bought in California and sold in California. However, the record also shows that the company bought produce from out-of-state suppliers and sold produce to the Princess cruise line and to firms having operations in other states, such as Marriott, a hotel chain [operating interstate], and Albertson and Smith, which are

interstate supermarket chains. The record specifically shows that strawberries and raspberries involved in this proceeding were sold to Marriott. The record further shows that sales of berries were made to Pace Warehouse and World Wide Foods, but no evidence was presented showing whether these companies have interstate operations. In 1992, Produce Place sold about 10 percent of its produce to hotels and about 60 percent to chain stores, with about 90 percent of its overall sales being made in the Los Angeles area. (Tr. 208, 294, 305-307; CX 6a, p. 8; CX 8a, p. 11.)

Produce Place's restrictive interpretation of the PACA, that the Act does not apply to its berry transactions, would lead to impractical results. For example, to follow its reasoning, if a producer, who has no control over the ultimate purchaser, sells berries to a dealer who sells them across the state line or sells them to a company who moves them to another state, the producer would be protected by the PACA for this interstate transaction. However, if the producer sells these berries, or another lot of the berries, to the dealer, and the berries in this instance are not sold in or moved to another state, the producer would not be protected. These results would not only lead to an uneven application of the PACA protection that Congress intended; it would also greatly burden the administration of the Act by requiring that produce involved in every transaction be tracked down to its ultimate

destination before it could be determined whether the PACA had jurisdiction.

This argument, that PACA's coverage is limited to goods which are proven to have actually crossed state lines, was rejected in Bank of Los Angeles v. Official PACA Creditors' Committee (In re Southland + Keystone), 132 B.R. 632 (9th Cir. BAP 1991), where the court held that transactions are subject to the PACA trust where the commodities involved are the type typically sold in interstate commerce and the producers are the type Congress intended to protect by implementing the Act. As Produce Place regularly conducts business with interstate shippers and purchasers, including, specifically, the sale of the berries involved here to the Marriott Company, a national hotel chain, I find that Produce Place is engaged in interstate commerce, that it is engaged in a business that Congress intended to regulate, that the produce involved here is of the type sold in interstate commerce, and that the producers and shippers who sold berries to Produce Place are persons that Congress intended to protect. I accordingly find that all the transactions involved in this proceeding are subject to the PACA.

IV. Sanction

Alteration of the inspection certificates was a serious violation. . . . [S]uch a practice is fraught with the danger that altered certificates could cause injury to any party

unwittingly relying on the certificates. However, the record as a whole does not support complainant's demand that Produce Place's license be revoked. Of the thousands of transactions examined by Romero, complainant's investigator, only these few were found to be irregular. The record shows that Kaplan acted alone and on his own initiative in altering the certificates, and he did it in part because of the difficulty in reconciling the storage temperature of produce with the higher temperatures of the produce resulting from the exigencies of the inspection process. Herman, the company's president, was unaware of the altered certificates, and took prompt action[, after PACA showed him the irregularities,] to have the person responsible, Kaplan, acknowledge his misdeed to Romero.

The testimony of the producer/shipper representative, Jurach, indicates that the alterations did not result in the loss of revenue, and she continues to do business with Produce Place. Moreover, Produce Place has no history of prior violations. . . .

Findings of Fact

1. Respondent, The Produce Place, is a produce dealer and a California corporation located at 1700 East Bay Street, Los Angeles, California 90021. It received PACA license number 850138 in 1988. (Complaint and answer.)

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2. Bay Fruit and Vegetable, Inc., and Coastal Berry Corporation are producers and shippers selling strawberries and raspberries to respondent.

3. Ted Kaplan, an employee[, one-third owner (CX 1),] and vice president of respondent, [who "head[s] up the sales force and buying force" of Respondent (Tr. 311),] falsified for a fraudulent purpose the temperature readings on six USDA produce inspection certificates and submitted them to Bay Fruit and Vegetable, Inc., and Coastal Berry Corporation in connection with purchases of strawberries and raspberries from October 7, 1992, through November 7, 1992.

Conclusions of Law

The alteration of the inspection certificates by respondent's employee[, one- third owner,] and vice president, Ted Kaplan, with respect to the transactions set forth in Finding of Fact No. 3, constitute a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

. . .

III. Interstate Commerce.

Respondent contends that the ALJ erred in finding "that Produce Place is engaged in interstate commerce, that

it is engaged in a business that Congress intended to regulate, that the produce involved here is of the type sold in interstate commerce, and that the producers and shippers who sold berries to Produce Place are persons that Congress intended to protect" (Initial Decision at 29). However, I agree with the ALJ, and with his reliance on Bank of Los Angeles v. Official PACA Creditors' Committee (In Re Southland + Keystone), 132 B.R. 632 (9th Cir. BAP 1991). Section 1(3) of the Act provides (7 U.S.C. § 499a[(b)](3)): [See page 2 of the Petition for Writ of Certiorari, supra].

Section 1(8) of the Act provides (7 U.S.C. § 499a[(b)](8) (emphasis added)):

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

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In holding that all of the Debtor's produce transactions (including local transactions within the State of California) and the resulting receivables are subject to the PACA trust, the court held in Bank of Los Angeles v. Official PACA Creditors' Committee, supra, 132 B.R. at 640-41:

> Second, section 499a(8) modifies and refines the definition of "interstate and foreign commerce" in section 499a(3) by providing which commodities "shall be considered in interstate or foreign commerce." The definition in subsection (8) is essentially consistent with the broad definitions of interstate commerce developed by the Supreme Court. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258 (1964). In determining which commodities are included in the PACA trust, it makes little sense only to look at subsection (3) and to ignore subsection (8). [Emphasis in original.] . . .
>
> The trial court relied upon subsection (8) in determining that all of the Debtor's produce transactions and the resulting receivables are subject to the PACA trust because the commodities involved are the type typically sold in interstate commerce and because the sellers involved are the type that Congress intended to protect by implementing PACA. All the Debtor's transactions would therefore be covered by PACA. As a result, there are no material issues of fact regarding the percentage of intra- versus inter-state transactions. Summary judgment in favor of the Committee was thus appropriate.

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Although the court relied on other arguments rele-vant to the trust fund provisions that are not relevant to the present proceeding, the foregoing analysis by the court is not merely dicta, but, rather, is one of the bases upon which the court decided the case. Under the court's construction of the Act, with which we concur, it is not necessary to prove that the berry transactions here were actually in interstate commerce because, under subsection (8) (7 U.S.C. § 499a(8)), they "shall be considered" in interstate or foreign commerce as long as they are part of that "current of commerce usual in the trade in that commodity" whereby interstate commerce occurs.

In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964), relied on by the court in the preceding quotation as consistent with the interstate commerce definition in subsection (8) of the PACA (7 U.S.C. § 499a(8)), the Court stated:

> It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460, 464 (1949). See Labor Board v. Jones & Laughlin Steel Corp., supra.
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> As Chief Justice Stone put it in United States v. Darby, supra: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect

> interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch v. Maryland, 4 Wheat. 316, 421." At 118.
>
> Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may--as it has--prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

Kaplan's activities as to the berries involved here are clearly "part of that current of commerce usual in the trade in that commodity" (7 U.S.C. § 499a(8)) whereby interstate commerce occurs. In addition, as the ALJ noted, "Produce Place regularly conducts business with interstate shippers and purchasers, including, specifically, the sale of the berries involved here to the Marriott Company, a national hotel chain" (Initial Decision at 29).

Respondent contends that in In re Full Sail Produce, Inc., 52 Agric. Dec. 608 (1993), the "Department reaffirmed the standard that there must be interstate commerce which involves either the movement of product from one state to another or the expectation that the product will

move from one state to another" (Respondent's Appeal Petition at 14). However, nothing in Full Sail so holds. In Full Sail, the Department's investigator "devised a stringent test . . . to determine which of the transactions were unquestionably in interstate commerce" (52 Agric. Dec. at 614), but he was "later directed by a supervisor to expand the list to include all of the one million dollars worth of transactions because all were .in contemplation of interstate commerce"' (52 Agric. Dec. at 615). "In response to a . . . letter from Respondent's attorney objecting to the inclusion of intrastate transactions as part of paragraph 5 of the Complaint, Complainant winnowed out all of the transactions challenged in the letter, and prepared CX 3 to demonstrate $245,411.37 was owed by Respondent to 20 sellers for 290 transactions involving perishable agricultural commodities purchased, received and accepted in interstate commerce during the period June 1988 through October 1988" (52 Agric. Dec. at 615). In Full Sail, it was, of course, held that "a transaction involves interstate commerce if it involves a commodity which has previously been moved interstate" (52 Agric. Dec. at 617). But this is not equivalent to a holding that a transaction shall not be considered in interstate commerce under subsection (8) (7 U.S.C. § 499a(8)) unless the specific transaction in the case relates to one in which there has been movement of the product from one state to another, or the expectation that the product will move from

one state to another. In Full Sail, there were so many transactions clearly fitting the definition of interstate commerce in subsection (3) (7 U.S.C. § 499a(3)) that there was no need to consider the transactions in the current of commerce under subsection (8) (7 U.S.C. § 499a(8)). Hence, Respondent's reliance on Full Sail is misplaced.

Respondent also cites reparation decisions, contending that they hold that there "must be either a crossing of state lines or a reasonable expectation by the parties of movement in interstate commerce" (Respondent's Appeal at 14). However, decisions in reparation cases are never regarded as binding, or even persuasive, in disciplinary cases since the Judicial Officer gives so little attention to reparation decisions. In Finer Foods Sales Co. v. Block, 708 F.2d 774, 779 (D.C. Cir. 1983), the court referred to the fact that "[i]n a typical case, he [the Judicial Officer] spends approximately 30 seconds reviewing and signing the [reparation] decision." Accordingly, no reparation decision is relevant here. Nonetheless, I note that in the reparation case primarily relied upon by Respondent, Tulelake Potato Distributors, Inc. v. Giustino, 52 Agric. Dec. 752 (1993), it is stated (52 Agric. Dec. at 757-60):

> Subsequent decisions have reinforced the idea that any transaction that contemplated movement in interstate commerce would be subject to the jurisdiction of the Department, regardless of whether the commodity involved actually crossed state lines. . . .

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In Stafford v. Wallace, 258 U.S. 495 (1922) the Court held that a stockyard was part of the current of interstate commerce and subject to the regulations of the Packers and Stockyards Act. [Footnote omitted.] The stockyards were deemed necessarily a part of that current of commerce because the general movement in the cattle industry was from the West to the Middle West and East and that movement was known and intended by all. Similarly here, a purchaser who buys produce does not buy it for personal consumption and so it must be known by all and intended by all that the purchaser will re-sell the produce and where the produce will end its transit cannot be anticipated with any amount of certainty. For example, a grower selling produce to someone who only does a small amount of business out of state cannot with certainty predict where the fruit will end its transit. The purchaser could send the produce across town, or across the country. Furthermore, the purchaser might repack the produce and commingle it such that it would be impossible to trace where the product grown by that grower ended its transit. Such a lack of certainty as to its final destination gives the parties a reasonable expectation that the commodity will involve interstate commerce.

. . . Likewise, there is interstate commerce when there is evidence that a substantial portion of the buyer's products are eventually sold out of state, even if the commodity subject to this transaction might not have left the state. Troyer v. Blue Star Potato Chip Corp., 27 Agric. Dec. 301 (1968). In Troyer there was testimony that the respondent's business was near the state border, and that a substantial portion of the respondent's business was across the state border. There was however, no testimony that the

commodity involved in the transaction at issue crossed a state border. The Department reasoned that if a party sells a commodity to someone who does business in other states, the selling party could not argue that it was sold without contemplating interstate commerce. Troyer also relied on the statutory language making the transaction in interstate commerce if it is usual in the trade for the commodity to cross a state line.[3]

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[3] See supra. 7 U.S.C. § 499a(8) (stating that a transaction "shall be considered to be in interstate . . . commerce if such commodity is part of that current of commerce usual in the trade in that commodity . . .").

. . . The C.B. Foods decision again relied heavily on the statutory language of section one that makes a transaction in interstate commerce if it is "part of that current of commerce usual in the trade in that commodity whereby such commodit[ies] are sent from one State with the expectation that they will end their transit after purchase in another." [40 Agric. Dec.] at 966-67, quoting 7 U.S.C. § 499a(8). In addition the Judicial Officer found that "the statutory provisions apply the familiar current of commerce concept under which interstate transactions that are interwoven with the current of interstate commerce are 'in commerce."' C.B. Foods, [40 Agric. Dec.] at 970.

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. . .

ORDER

Respondent's license is suspended for 90 days,

This Order shall take effect on the 30th day after service of this Decision and Order on Respondent.